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Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-740

IN THE
# Supreme Court of the United States

SSA GULF, INC.,

*Petitioner,*

v.

ROOSEVELT MAGEE,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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February 2005

## QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, allows removal on the basis of federal question jurisdiction because it completely preempts all state-law tort suits by longshore employees against stevedore employers.

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## RESPONDENT'S BRIEF IN OPPOSITION

Petitioner seeks this Court's review of an unreported order of the Fifth Circuit summarily denying its petition for a writ of mandamus to review the district court's unreported order remanding this case to state court under 28 U.S.C. § 1447(c). The district court below found that it lacked federal question jurisdiction for the reasons set forth in its earlier unreported order in *Hernandez v. Todd Shipyards,* 2004 WL 1543184 (E.D. La. 2004). Petitioner recently sought a writ of certiorari in *Hernandez* relying on the same arguments it makes here, but the Court denied the writ. *SSA Gulf, Inc. v. United States Dist. Court for the Eastern Dist. of Louisiana*, 125 S. Ct. 508 (2004). The Court should also decline to review the unreported, single-page orders at issue here, because the petition is nothing more than an attempt to get a second chance at certiorari in *Hernandez*.[1]

As an initial matter, the petition should be denied because 28 U.S.C. § 1447(d) prohibits appellate review of remand orders based on a lack of subject matter jurisdiction, and every circuit that has addressed the issue has concluded that remand for lack of complete preemption is unreviewable.

Even if § 1447(d) did not prohibit appellate review of the order at issue, the petition should be denied because there is no circuit split on whether LHWCA completely preempts all

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[1] Petitioner errs by claiming that "[t]he district court entered an order of remand without deciding whether the LHWCA completely preempts state-law claims against stevedore employers . . . ." Pet. at 4. In fact, the district court adopted the decision in *Hernandez*, *see* Pet. App. 2a, and *Hernandez* held that LHWCA does not satisfy the requirements for complete preemption. *Hernandez*, 2004 WL 1543184, at *5.

state-law causes of action related to workplace injuries suffered by longshore employees. The cases cited by petitioner as evidence of a conflict do not even address the complete preemption doctrine, and petitioner does not cite a single case holding that LHWCA completely preempts all torts arising from maritime employment. Petitioner implies that the exclusive remedy provision of LHWCA preempts all other causes of action, but petitioner cites no authority equating the exclusive remedy provision with complete preemption. To the contrary, the district court's determination that LHWCA does not completely preempt all state law causes of action such that it triggers federal question jurisdiction is based on a sound application of the relevant precedent, and it does not conflict with this Court's decisions regarding the complete preemption doctrine.

Finally, petitioner claims that the denial of certoriari in *Hernandez* has caused a "flood of new cases" against stevedore employers in "notorious anti-defendant venues," but petitioner cites only this case as evidence of the "flood." Pet. at 6. Even if there were such a flood, it would not disrupt the LHWCA benefits scheme as forecast by petitioner, because federal preemption can still be raised as a defense in state court.

## STATEMENT

Respondent Roosevelt Magee worked as a longshoreman for petitioner (and/or its predecessor(s)) and other stevedoring companies, loading and unloading cargo at the Port of New Orleans. In connection with his work, Magee was exposed to asbestos that, he alleges, caused him to contract asbestos-related diseases, including lung cancer. Magee filed suit in Louisiana state court against petitioner and others, seeking damages for his injuries. Magee never pursued a claim

under LHWCA, and his lawsuit did not invoke LHWCA or any other federal cause of action. Rather, Magee based his case entirely on state-law tort theories.

## REASONS FOR DENYING THE WRIT

### I. The Petition Should Be Denied Because 28 U.S.C. § 1447(c) Precludes Review.

"Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995). The district court's remand order in this case falls squarely within the prohibition on appellate review contained in 28 U.S.C. § 1447(d). As a consequence, this Court lacks jurisdiction over the merits of the case. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . .") (internal quotation marks omitted).

"As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered*, 516 U.S. at 496. Here, the district court explicitly remanded the case "pursuant to 28 U.S.C. § 1447(c) . . . for lack of subject matter jurisdiction." Pet. App. 2a. "Section 1447(d) thus compels the conclusion that the District Court's order is not 'reviewable on appeal or otherwise.'" *Things Remembered*, 516 U.S. at 128 (quoting *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam)).

### A. The *City of Waco* Exception Does Not Apply, and Every Circuit That Has Addressed the Issue Has Concluded That A Remand for Lack of Complete Preemption Is Not Reviewable.

Petitioner attempts to avoid § 1447(d) by arguing that the district court's ruling concerning complete preemption is an independently reviewable "antecedent," separate from the question of subject matter jurisdiction. Pet. at 24-25. In support of this theory, petitioner relies on a 1934 decision of this Court, *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934). There, the district court had "entered a single decree embodying three separate orders." *Id.* at 142. One of the orders granted the Fidelity Company's motion to dismiss a cross-complaint by the City of Waco; another order held that the court lacked jurisdiction following the dismissal (because there was no diversity among the remaining parties) and remanded the case to state court. *Id.* The City appealed, "not from the order of remand, but from [the order] dismissing its action against the Fidelity Company." *Id.* The Court acknowledged that "no appeal lies from the order of remand," but held that the dismissal order was appealable because "in logic and fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause." *Id.* at 143.

Petitioner cites a handful of cases in which courts have exercised appellate jurisdiction under *City of Waco*. Conspicuously absent, however, is any case in which complete preemption was asserted as a basis for removal. In fact, every court of appeals to have addressed the issue has concluded that a remand based on a lack of complete preemption is insulated from review under § 1447(d):

- **Fourth Circuit:** In *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321-22 (4th Cir. 1993), the Fourth Circuit rejected the suggestion that *City of Waco* permitted it to exercise appellate jurisdiction over a district court's conclusion that removed state law claims were not completely preempted under the LMRA or ERISA. "The district court's determination that neither ERISA nor the LMRA preempted [plaintiff's] state law claim is inseverable from its determination that it lacked jurisdiction. Because complete preemption was the basis for the district court's jurisdiction, the court's findings regarding preemption and jurisdiction are indistinguishable. The preemption findings were merely 'subsidiary legal step[s] on the way to its determination that the case was not properly removed.'" *Id.* at 321 (quoting *Ward v. FDIC*, 881 F.2d 564, 566 (8th Cir. 1989)).

- **Ninth Circuit:** In *Whitman v. Raley's Inc.*, 886 F.2d 1177 (9th Cir. 1989), the Ninth Circuit explained that "[a] remand based on lack of 'complete preemption' is a remand required by 28 U.S.C. § 1447(c)" and is therefore insulated by § 1447(d) from appellate review. *Id.* at 1181. "If the federal court rules that the claim is not 'completely preempted,'" the court explained, "then the federal court has no jurisdiction to rule on a substantive defense and remand is required. The substantive defense of preemption is then a matter for the state court to determine as a part of the trial proceedings." *Id.*

- **First Circuit**: In *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996), the First Circuit "interpret[ed] the district court's order of

remand [based on a lack of preemption] as a determination that it lacked subject matter jurisdiction over the removed case because no federal claim had been presented to invoke the court's federal question jurisdiction." The district court's rejection of the preemption argument "was a link in the chain of reasoning. But the preemption ruling, rather than being apart from the question of subject matter jurisdiction, is necessary to determine whether such jurisdiction existed." *Id.* (internal citations and quotation marks omitted).

- **Fifth Circuit:** In *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999), the Fifth Circuit held that "the district court's conclusion regarding the lack of complete preemption is insulated from appellate review by § 1447(d)." The Fifth Circuit has also rejected an argument that preemption-related remands are reviewable based on *City of Waco*. *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991) ("In [*City of Waco*], the 'separable portion' of the order denied a right not subject to review by the state court. . . . [T]he state court would not reconsider the dismissal of the cross-action . . . . In this case, by contrast, because we interpret the remand order as jurisdictional, the state court will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect. Because we conclude that § 1447(d) bars us from reviewing the remand order, we do not reach the appellants' arguments on the preemption issue.").

- **Eleventh Circuit:** In *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1987), the

> Eleventh Circuit, in a brief *per curiam* opinion, held that a district court's remand based on the lack of ERISA preemption was unreviewable. The preemption question was "related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. In particular, the [district] court did not reach the merits of the preemption argument. The state court may in fact rule that ERISA does preempt appellees' state law claims and that appellees must proceed, as appellants contend, under . . . ERISA." *Id.* at 1540.

The law of other circuits is fully consistent with these decisions. *See Spielman v. Merrill Lynch*, 332 F.3d 116, 131 (2d Cir. 2003) ("[I]f the district court determines that the criteria for complete preemption have not been met, then the plaintiff's state law suit does not arise under federal law, the district court lacks federal question jurisdiction, and the case must be remanded to the state court for lack of jurisdiction. The defendant cannot appeal because of 28 U.S.C. § 1447(d).") (citations omitted); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) (adopting analysis of Ninth, Fifth and Eleventh Circuits); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 n.7 (3d Cir. 1995) ("[W]ere the district court considering preemption as a basis to assert jurisdiction in the first instance, the bar of § 1447(d) may well apply and it is not clear that the *Waco* exception could be used. This would present a significant jurisdictional problem given the bar to review in § 1447(d)."); *cf. Adkins v. Illinois Cent. RR. Co.*, 326 F.3d 828, 833 (7th Cir. 2003) ("[A] district court's conclusion that an initial acceptance of a claim of 'complete preemption' was erroneous[] reveal[s] that the federal court never had jurisdiction of the case to begin with.").

By contrast, the decisions applying *City of Waco* cited by petitioner all involve situations, as in *City of Waco* itself, in which an order of dismissal preceded and was wholly distinct from the order remanding the case. *See Nutter*, 4 F.3d at 321 ("Most decisions applying *City of Waco* have involved orders dismissing some party or claim."). This is because "[t]he purpose of the *City of Waco* doctrine is to prevent one of the parties from being prejudiced by a claim of preclusion made after the remand to the state courts." *Ward v. FDIC*, 881 F.2d 564, 566 (8th Cir. 1989).[2]

The ruling in this case, however—that LHWCA did not completely preempt the state law claims—is not the final word on the issue of preemption: The district court itself concluded that petitioner was free to raise a substantive preemption defense based on LHWCA's exclusive remedy provision in state court, *see Hernandez*, 2004 WL 1543184, at *5, and many other decisions are in accord. *See, e.g.*, *Whitman*, 886 F.2d at

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[2] Three of the decisions cited in the petition are based on unique procedural circumstances arising under the Westfall Act, 28 U.S.C. § 2679(d)(2), which provides that the Attorney General's certification that a federal employee sued in a state court tort suit was acting within the scope of the employee's office "shall conclusively establish the scope of office or employment for purposes of removal." *See Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000); *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). In these cases, "[t]he district court dismissed the United States as a defendant and resubstituted [the individual officer defendant] while it still had control of the case" and "[o]nly then did the court remand the case to state court." *Mitchell*, 896 F.2d at 133.

1181 ("The federal court's ruling on 'complete preemption' has no preclusive effect on the state court's consideration of the substantive preemption defense. This, of course, is particularly appropriate because the jurisdictional decision of lack of complete preemption is insulated by section 1447(d) from appellate review."); *Soley*, 923 F.2d at 410 ("[B]ecause we interpret the remand order as jurisdictional, the state court will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect."); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 405 (7th Cir. 2001) ("[U]pon remand to state court, that court will be free to consider the question whether the Federal Aviation Act preempts the claim Vorhees is attempting to present here—a claim on which our jurisdictional ruling rejecting 'complete preemption' or occupation of the field has no bearing."); *Gonzalez-Garcia*, 99 F.3d at 492; *Nutter*, 4 F.3d at 321; *Glasser*, 806 F.2d at 1540. Thus, petitioner's "antecedent order" theory based on *City of Waco* has no support, and petitioner's suggestion that there is a "conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d)," Pet. at 27, is simply wrong.

### B. The *Thermtron* Exception Does Not Apply.

Petitioner also places heavy reliance on the Fourth Circuit's decision in *Shives v. CSX Transportation*, 151 F.3d 164, 167 (4th Cir. 1998), which purported to apply this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). *See* Pet. at 26. Neither *Shives* nor *Thermtron*, however, supports appellate jurisdiction in this case.

First, *Shives* did not involve a remand based on a lack of complete preemption by LHWCA, and the Fourth Circuit

itself has concluded that a remand based on a lack of complete preemption is unreviewable. *See Nutter*, 4 F.3d at 321-22.[3]

Second, regardless of whether the *Thermtron* exception was properly applied in *Shives*, it does not apply here. *Thermtron* held that § 1447(d) did not preclude appellate review of orders by a district court judge who had remanded cases to the state court solely because his docket was too crowded. The Court explained that the § 1447(d) ban on review "on appeal or otherwise" must be read *in pari materia* with 28 U.S.C. § 1447(c), so that "only remand orders issued under § 1447(c) and invoking the grounds specified therein" are immune from review. 423 U.S. at 346. The Fourth Circuit in *Shives* construed the district court's remand as an order based on FELA's non-removal provision rather than a remand based

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[3] The plaintiff in *Shives* sought relief for his workplace injury by initiating two different proceedings under two mutually exclusive federal statutes. He brought a claim in Maryland state court under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, and he filed an administrative claim with the Department of Labor under LHWCA. *Shives*, 151 F.3d at 166. The determination of which claim would proceed turned on whether, at the time of his work-related injury, the plaintiff was engaged in "maritime employment" within the meaning of LHWCA, 33 U.S.C. § 902(3). Following removal, the district court found that the plaintiff was not covered by LHWCA and remanded the case to allow the FELA claim to proceed in state court. The Fourth Circuit reversed, holding that the plaintiff was engaged in maritime employment, and therefore his FELA case should be dismissed and his LHWCA claim should proceed through the administrative process. *Shives*, 151 F.3d at 171.

on § 1447(c): "In this case, the district court could not rule, in a strict sense, under § 1447(c) that it was without jurisdiction because federal courts have concurrent jurisdiction over FELA claims. *See* 45 U.S.C. 56. Rather, it ruled properly that an FELA claim could not be *removed* from a state court to a federal court. *See* 28 U.S.C. 1445(a)." *Shives*, 151 F.3d at 167 (emphasis in original).

In sum, because it is undisputed that the district court's order in this case relied exclusively on § 1447(c), *Shives* is inapposite and the remand is not reviewable. *Thermtron*, 423 U.S. at 343 ("If a trial judge purports to remand a case on the ground that it was removed [for the reasons specified in section 1447(c)] his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise."). For these reasons, the Fifth Circuit did not have appellate jurisdiction, and review should be denied on that basis alone.

## II. Petitioner Fails to Cite a Single Case Holding That LHWCA Completely Preempts All State-Law Causes of Action Related to Workplace Injuries Suffered by Longshore Employees.

Even if § 1447(d) did not prohibit appellate review of the remand order at issue, the petition should be denied because there is no circuit split on the question presented. Petitioner seeks review because it is dissatisfied with the district court's finding that LHWCA does not completely preempt state law tort suits by longshore employees against stevedore employers. But try as it might, petitioner is unable to cite a single case finding that LHWCA satisfies the complete preemption doctrine. Instead, petitioner claims that there is a "conflict" and "tension" between the decision below and rulings in other circuits, but the cases petitioner cites present no circuit split

regarding complete preemption. *See* Pet. at 9 (citing nine case, none of which mentions complete preemption).

Petitioner errs by conflating the exclusive remedy provision of LHWCA with complete preemption doctrine. *Id.* The decision below would conflict with the cases cited by petitioner only if the court had held that LHWCA is not the exclusive remedy for certain workplace injury claims brought by longshore employees against their employers, but because that issue is not germane to the complete preemption analysis, the court below had no reason to reach it. Thus, it is premature for petitioner to seek certiorari on the issue of whether § 905(a) bars respondent from any state tort recovery from petitioner. That question is fact-intensive, and can be resolved only after fact development in the trial court. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (LHWCA does not bar all state remedies against the employer); *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523, 530 (1983) (§ 905(a) does not bar negligence suits against a stevedore employer where the employer is also the vessel owner); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) ("[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment."); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87 (1991) (LHWCA does not provide the exclusive remedy for harbor workers who are also members of a vessel's crew); *Sample v. Johnson*, 771 F.2d 1335, 1346 (9th Cir. 1985) (noting that exclusive remedy provision of § 905(a) does not apply to claims of intentional injury). Indeed, the decision of the district court in *Hernandez*, adopted by reference by the district court below, concludes that although LHWCA does not satisfy the complete preemption doctrine, the exclusive remedy provision of LHWCA may provide a preemption defense that can be raised in state court.

*Hernandez*, 2004 WL 1543184, at *5, citing *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001).

## III. The District Court's Determination That LHWCA Does Not Completely Preempt All State-Law Causes of Action Is Based on a Sound Application of the Relevant Precedent and Does Not Conflict with this Court's Decisions Regarding the Complete Preemption Doctrine.

Contrary to petitioner's assertion, the court below did not apply "an improper legal test that conflicts with governing precedent of this Court . . . ." Pet. at 14. Rather, the court below found that LHWCA did not, in fact, satisfy the governing test for complete preemption, but that petitioner could nevertheless raise preemption as a federal defense in the state court. *See Caterpillar Inc., v. Williams*, 482 U.S. 386, 393 (1987) ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption.") (emphasis in original, citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 12 (1983)). Petitioner claims that the district court decision, by relying on *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1164-65 (5th Cir. 1989), conflicts with this Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003). Pet. at 14. Petitioner is wrong. The portion of *Aaron* quoted by petitioner was expressly *not* followed by the district court below because, in *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775-76 (5th Cir. 2003), the Fifth Circuit modified its complete preemption analysis to conform with *Beneficial*. The district court decision explains this modification in detail and expressly does not follow the part of *Aaron* "arguably undermined by *Hoskins*." *Hernandez*, 2004 WL 1543184, at *4. However, petitioner

ignores this discussion and thus erroneously claims that the court below applied an obsolete legal standard.

Petitioner next urges this Court to grant review "to continue the clarification of the complete preemption doctrine." Pet. at 15. But the discussion that follows reveals that petitioner seeks not *clarification*, but rather *expansion* of the doctrine. Under the expansion urged by petitioner, any federal statute with an exclusive remedy provision that might form the basis for a federal preemption defense in state court would become a source of complete preemption. The sweeping change urged by petitioner would make complete preemption the rule rather than the exception.

Indeed, in arguing that the "sheer comprehensiveness of the federal regulatory scheme . . . creates federal question jurisdiction under the complete preemption doctrine," Pet. at 17, petitioner urges a position already rejected by this Court in *Southwest Marine,* a decision petitioner fails to cite. In *Southwest Marine,* this Court found that "[t]he administrative proceedings outlined under the LHWCA in no way approach the NLRA's complex and interrelated federal scheme of law, remedy and administration requiring pre-emption in those cases [and] [n]either is it essential to the administration of the LHWCA that resolution of the question of coverage be left in the first instance to agency proceedings in the Department of Labor." 502 U.S. at 91 (internal quotation marks and citations omitted).

## IV. The Court Should Not Review this Case Based on Petitioner's Unsubstantiated Forecast of a "Flood" of New State Court Cases.

Finally, petitioner predicts the decision below will cause a flood of new cases that will disrupt the LHWCA benefits scheme by requiring defendant employers to raise LHWCA as a preemption defense to state court tort suits. Pet. at 6. But petitioner cites only this case and *Hernandez* as evidence of the flood, and petitioner's warning of a wave of conflicting state court decisions on whether such suits can be maintained is undermined by petitioner's assertions regarding the strength of LHWCA's exclusive remedy provision.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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February 2005